Supreme Court, U. S.
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No. 80-326

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES L. JOHNSON,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1980

QUESTION PRESENTED

1. Whether Petitioner's conviction for mail fraud was such a gross miscarriage of justice that this Court should issue a Writ of Certiorari in order to review the record below even though the conviction did not involve a question of law which has been conflictingly answered among the Courts of Appeal or between the Courts of Appeal and a State Supreme Court.

PARTIES

The parties are limited to those presented in the case caption.

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The Petitioner Charles L. Johnson respectfully prays that a Writ of Certriorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 6, 1980.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 6, 1980. A timely petition for rehearing was denied on July 18th, 1980, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 18:

"Section 1341. *Frauds and Swindles.*

Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing some scheme or artifice or attempting so to do, places in any post office or authorized depository for mail, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five (5) years, or both."

STATEMENT OF THE CASE

On the 12th and 13th of January, 1977, Jack Amason, a highly successful and well respected businessman with twenty years of experience in the insurance business, met in Kansas City with the Petitioner Charles Johnson, himself a successful insurance businessman, Christian Mentrup, an attorney experienced in insurance law whose offices were in Kansas City and Charles Bazarian, an experienced insurance salesman and President of Central

Management Systems (CMS), a general insurance agency whose offices were located in Oklahoma City, Oklahoma. The purpose of the two-day meeting was to explore the feasibility of establishing a health care benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA). At the conclusion of this meeting, Amason, Johnson and Bazarian signed a tentative agreement which established in principle that Amason and Johnson would develop a health care plan which would in turne be marketed through CMS. The details of the proposed health care plan were deferred to a later date. Thereafter, on January 17th, Amason, Johnson and Mentrup met with Jim Lane another insurance attorney, Bob King, an insurance executive and Gene Hawkins, a consulting actuary with 28 years experience. Each of the men present at this meeting were expert in their respective field. The meeting was conducted in Dallas, Texas and lasted one week. Each day consisted of a 14- to 18-hour working session. The purpose of this meeting was to discuss the new federal health care laws and how a health care plan predicated on the new laws might be devised. As a result of this meeting these six experienced men developed a health care plan testatively naming it the National Health Association (R. 8-13, 28-29).

After the January 17th meeting in Dallas, Texas, Amason developed and caused to be published all of the necessary written documents needed in order to establish, market and administer the Association and its health care plan. Amason paid the entire costs of the project (R. 12, 16, 20).

Although Amason was the individual who had initiated both the Kansas City and Dallas meetings, paying the en-

tire cost of both, he eventually determined that participation in the program would bring him too much exposure in the insurance market in the sense that such exposure would probably result in his being viewed by other insurance companies as a competitor and hence would quit doing business with him. Thus Amason notified Johnson that he could not participate in the proposed National Health Association. Johnson agreed and the project died (R. 17-19, 32-33).

Nevertheless Bazarian, who had not attended the week-long Dallas meeting, remained extremely interested in a health care plan predicated on the new ERISA laws and desired to market such a plan through his CMS corporation.[1] Accordingly, a short time after the Dallas meeting, Bazarian called Amason and at that time was informed that Amason was no longer interested in the project. Bazarian then called Johnson, telling him of his continuing interest and requested a meeting. Two meetings then occurred between Bazarian and Johnson (R. 230). The first meeting was in Dallas, Texas with another shortly thereafter in Kansas City. Menthrup, the insurance attorney was present at the Kansas City meeting. Johnson, Bazarian and Menthrup determined to revive the project. Menthrup was designated the legal advisor, Bazarian was responsible for coordinating marketing plans, day-to-day management, claims, etc. The Petitioner Johnson was given no direct responsibility of any kind but did serve as a marketing advisor to Bazarian (R. 222-232).

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[1] Bazarian's wife was the sole owner of 100% of the stock in CMS corporation (R. 225).

Participants in the newly formed United Health and Retirement Association (UHARA) were required to pay an initial $30.00 membership fee with periodic contributions made thereafter. The agreement between Menthrup, Bazarian and Johnson was as follows: Fifteen percent of contributions received would be set aside to establish a reserve fund for the purpose of satisfying claims filed by association members.[2] Seventy percent would go to CMS[3] with the remaining fifteen percent to Johnson (R. 233-234). At trial Bazarian testified only to the eighty-five percent amount; fifteen percent to Johnson[4] with seventy percent paid to CMS to be apportioned fifty percent for salesmen's commissions and twenty percent for overhead. Bazarian never accounted for the remaining fifteen percent nor did the prosecutors question on this point (R. 233-234). Bazarian testified that he lost $55,000 dollars (R. 235). No accounting for the loss was presented at trial.

Soon after the second meeting between the Petitioner and Bazarian CMS began marketing the health care plan. Bazarian established his mother-in-law Rachel Bicknell as the plan administrator and his two brothers-in-law, William

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[2] Of the 70% of contributions paid to CMS, 50% was to be paid as commissions to the various salesmen with 20% being retained by CMS to meet overhead costs (R. 233-234).

[3] Hawkins, the actuary, had recommended that a reserve fund of 20% be established but testified at trial that 15% would be adequate (R. 122-123).

[4] In addition to his fifteen percent payment to Johnson as a precondition to his being given the right to market the health care package Amason then had designed (now designated UHARA), Bazarian also had to execute a covenant not to compete and to reimburse Amason his development costs (which he never did). (R. 33-34, 229)

F. Bonadio, Sr. and James F. Tedford as the plan's trustees (R. 228). Bazarian was president of CMS and his wife Janice was the sole stockholder (R. 225). CMS marketed the plan for only three months but during this period collected slightly more than $347,000.00. During the brief 90-day operating period, Johnson did not review the financial structure of UHARA in detail. No evidence of any nature was presented at trial indicating that review of the financing structure was one of his responsibilities. During this same three-month period Johnson was preoccupied with his 21-year-old daughter who was hospitalized and dying of cancer in Houston, Texas (R. 255).

Bicknell, the plan administrator and Bazarian's mother-in-law, never saw Petitioner in the CMS office (R. 75) and could only recall speaking with Johnson twice during the three months the plan was marketed and these conversations pertained to unrelated matters (R. 57). She indicated that she received advice from Menthrup only. *Johnson had no authority of any kind over any of the accounts of CMS and had no access to any money paid to CMS by UHARA participants* (R. 91, 96).

During January and February of 1977 when the plan was still under consideration, Bazarian had urged CMS as an ideal corporate vehicle to market the health care plan because it was an established on-going business designed for exactly that purpose. The record showed that in the 90 days the plan was marketed, $17,315.21 was paid on office expense, $8,602.72 was spent on miscellaneous salaries, $15,189.63 was spent for "management", $6,721.27 was issued for furniture and equipment and $3,032.28 in checks

were negotiated for cash. The records also show that while no reserve was ever established by Bazarian, he negotiated a substantial loan to CMS from UHARA using contribution funds. Beyond this the record provides only the most scanty accounting for the remaining balance of the $347,000.00 which was paid to CMS.

In May 1977, Louis Martinez, a supervisory compliance officer with the United States Department of Labor Management Services Administration, conducted a routine investigation of UHARA and found that no reserve fund had been established. Martinez recommended that further investigation be conducted and in June, 1977, Wallace E. Puggsley, Jr., a postal inspector with the United States Postal Service, conducted an audit of UHARA's accounts. During the entire period when UHARA was being investigated by the United States Attorney for the Western District of Oklahoma, the grand jury for the United States District Court for the Western District of Oklahoma, the Department of Labor Management Services Administration and the United States Postal Service, the Petitioner *Johnson was never interviewed either in person or by phone in Texas or in Oklahoma* (R. 179-194, 272-300).

At trial the Government called as witnesses several UHARA participants[5] whose testimony outlined in detail the manner in which they had purchased their membership, who they had purchased their membership from and what they had been told. Each participant testified that they had never heard of or met the Petitioner Johnson and that in fact they had no idea who he was (R. 124-211).

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[5] Who had filed a claim which had not been paid.

Although Bazarian testified that he was in telephone contact with Johnson approximately every other day during the three-month period, they spoke only with respect to the marketing of the health plan. Bazarian never stated or ever intimated that Johnson was aware to any degree that no reserve fund had been established. However, Bazarian specifically testified that Johnson had no control of any kind over UHARA's financial accounts (R. 224-269).

During the short-lived three-month period during which UHARA sold participating memberships, the Petitioner was commuting from his home in Austin, Texas to Houston, where his teenage daughter was hospitalized with terminal cancer (R. 255).

Bazarian, testifying for the Government, indicated he had pled guilty to mail fraud because he felt as though he had made a mistake and wanted to take his medicine (R. 226).

The jurisdiction of the District Court below was established under Title 18 U.S.C. §3231.

REASONS FOR GRANTING THE WRIT

1. Petitioner's conviction for mail fraud in the Federal District Court for the Western District of Oklahoma is a gross miscarriage of justice.

This Court has the authority on Petition for Writ of Certiorari to review the record below in order to determine the sufficiency of the evidence. *Thompson* v. *Louisville,* 362 U.S. 199 (1960). While a review of the record occurs only infrequently,[6] it most always is undertaken when it appears that a grave miscarriage of justice has occurred. This is precisely what has occurred in this matter and it is for this reason that Petitioner's counsel urges the Court in the strongest possible terms to hear this case.

In order to obtain a conviction for mail fraud under Title 18, United States Code, Section 1340, the Government must prove beyond a reasonable doubt that the Defendant's participation in an alleged scheme to defraud was a knowing participation which unerringly indicates the existence of a specific criminal intent. *United States* v. *Bryza,* 522 F.2d 414 (7th Cir. 1975), *cert. den.* 426 U.S. 912 (1976); *Windsor* v. *United States,* 384 F.2d 535 (10th Cir. 1967); *Hofman* v. *United States,* 353 F.2d 188 (10th Cir. 1965).

Although intent to defraud is an essential element of mail fraud, *United States* v. *Jones,* 425 F.2d 1048 (9th Cir. 1970), *cert. den.* 400 U.S. 823 (1970), convictions for mail fraud have been successfully obtained where the Government was able to show that the Defendant had acted with

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[6] The Business of the Supreme Court as conducted by Mr. Chief Justice Hughes, 63 Harv. L. Rev. 5, 14 (1949).

reckless indifference to the truth. *United States* v. *Sheiner,* 273 F.Supp. 977 (D.C. N.Y. 1967), *aff'd* 410 F.2d 337, *cert. den.* 396 U.S. 825 (1969). In these cases the Defendant was held chargeable as if he had knowledge of the falsity of the representations made and thus the requisite criminal intent. *Erwin* v. *United States,* 338 F.2d 770 (9th Cir. 1964), *cert. den.* 381 U.S. 911. Reckless indifference to the truth must be proven beyond a reasonable doubt because otherwise it would permit a conviction for mail fraud where no criminal intent actually exists. A mere breach of fiduciary obligation does not constitute the type of active fraud necessary to sustain a conviction. *Post* v. *United States,* 407 F.2d 319 (D.C. Cir. 1968), *cert. den.* 393 U.S. 1092 (1970).

During Petitioner's trial there was not a scintilla of evidence offered by the Government which suggested even to the slightest degree that the Petitioner was possessed with the necessary intent to defraud those who purchased memberships in UHARA. To the contrary, the testimony of the *Government's witnesses* established the clear improbability that any such criminal intent existed[7] (R. 32, 33, 34, 145-147, 169, 222, 230, 233-234). Amason testified that he had known the Petitioner for years and that he respected Johnson's ability and intelligence in the insurance industry (R. 34).

Amason's testimony established the painstaking attention to detail that he and the Petitioner took in preparing the health care package (R. 28, 29). Johnson, who lived in

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[7] Because the sufficiency of the evidence is contested, a request that a certified copy of the record be forwarded to this Court has been filed with the Tenth Circuit Court of Appeals. Supreme Court Rule 19(1).

Austin, Texas, was in Oklahoma City only twice during the 90-day period of operation and one visit was on a Saturday (R. 232). Hawkins' testimony established beyond any doubt that Amason and Johnson were very concerned that the plan be actuarily sound and that they took great pains to determine the amount of contributions which should be set aside in reserve to pay the claims filed by the persons participating in the plan (R. 103-123). Bicknell testified that she received all of her advice from Menthrup, the association's attorney, and had spoken with Johnson but twice with respect to unrelated matters (R. 57). Bazarian testified only that Johnson assisted him in coordinating the marketing of the plan (R. 82, 237-238, 248). Beyond this Bazarian never indicated that Johnson was aware that a reserve fund had not been established as intended (R. 244, 251). Bazarian did testify that Johnson had absolutely no control of any kind over the membership funds which were received by UHARA. And each of the individuals who had purchased memberships in UHARA had never met Johnson.

The Court of Appeals for the Tenth Circuit, per Judge Miller,[8] held that even if there was no fraudulent intent, Johnson's lack of awareness that no reserve had been established for the payment of any claims, could "only be characterized as 'reckless indifference' tantamount to knowledge of the falsity of the representations and promises regarding UHARA" (App., p. A-8). But there is no evidence anywhere in the record which could justify concluding beyond a reasonable doubt or even by a preponderance of the evi-

[8] On assignment from the Court of Claims.

dence that Johnson was acting with reckless indifference. The record clearly discloses that Johnson and Amason were extremely concerned that the plan be actuarily sound. Hawkins, the consulting actuary hired by Amason and Johnson, majored in actuarial science at Drake University. During the course of his 28 years as a student of actuary science, Hawkins passed a series of nine examinations and ultimately became a Fellow in the Society of Actuaries (R. 104).

There was not a scintilla of evidence submitted by the Government at trial which indicated that there was ever any thought to establish a plan with no provision for a reserve fund. The evidence is to the exact contrary. It is true that Bazarian received in excess of $347,000.00 and in fact did not establish a reserve fund; that fact has never been controverted. *Yet there was no evidence of any kind offered at trial which suggested that Johnson was aware that no reserve fund had been established.* Thus, how can it be concluded that Johnson was recklessly indifferent simply because he was unaware that there was no reserve fund, when the facts clearly show that the plan was only in operation for three months and that during these same three months Johnson was preoccupied with the fate of his 21-year-old daughter who lay dying of cancer in a Houston, Texas hospital not to mention the extreme care taken during development. There was no evidence of any kind offered at trial which suggested that Johnson was different from any other husband and father who must watch his daughter die of cancer. In this tragic circumstance there can be no denying the enormous strain to which each family member is subjected.

Johnson would have become aware that no reserve fund had been established if any Government investigator had ever contacted him. The uncontroverted evidence at trial showed that Johnson was never contacted either by mail, by phone, or in person by any Government investigator at any time prior to his arrest.[9] In view of these circumstances, the fact that Johnson was unaware that Bizarian had not established a reserve fund could at best be only a breach of fiduciary obligation (if indeed there was a fiduciary obligation) which falls far short of the required "intent to defraud" necessary to justify conviction under Title 18, United States Code, Section 1340. *Post* v. *United States,* supra.

The total absence of any competent evidence on which Petitioner's conviction for mail fraud could be based, which a review of the record quickly reveals, shows in shocking relief the outrageous nature of Johnson's conviction. There can be no other conclusion but that Johnson's conviction for mail fraud was a gross miscarriage of justice and should not have been allowed to happen. When such miscarriages of justice have occurred in the past this Court has accepted a case for review on petition for certiorari. *Thompson* v. *City of Louisville,* 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960); *Washington* v. *United States,* 357 U.S. 348, 2 L.Ed. 2d 1368, 78 S.Ct. 1373 (1958). The miscarriage of justice involved in this matter is no less grave than those in the cited cases.

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[9] Nor does the record disclose that the Government at any time requested a deposit in the amount necessary to establish an adequate reserve fund which Johnson could have easily done.

Petitioner's unjustified and unjustifiable conviction is a grave miscarriage of justice which serves only to erode the integrity and credibility of the United States criminal justice system and justifies the granting of certiorari to review the judgment below.

CONCLUSION

For this reason, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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August, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed June 6, 1980]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1132
CHARLES L. JOHNSON, Defendant-Appellant.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CR-78-160-E)

D. C. Thomas, Oklahoma City, Oklahoma, for Defendant-Appellant.

Eleanor J. Darden, Assistant U.S. Attorney (Larry D. Patton, United States Attorney, John E. Green, First Assistant United States Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before BARRETT and DOYLE, Circuit Judges, and MILLER,* Judge.

MILLER, Judge.

Appellant was convicted by a jury on five counts of mail fraud in violation of 18 U.S.C. § 1341. The district court sentenced him to a term of five years' imprisonment

*The Honorable Jack R. Miller of the United States Court of Customs and Patent Appeals, sitting by designation.

on each of counts I and II, to run concurrently; five years on count III, to run consecutively; four years on count IV, to run concurrently with count III; and five years on count V, to run concurrently with the previous counts.[1] The co-defendant, Charles Bazarian, pled nolo contendere to counts I and IV and was sentenced to four years' imprisonment, which was suspended, fined, and ordered to make restitution of $60,000. We affirm.

In brief, count I charged that appellant and Bazarian, along with four other individuals, devised a scheme lasting from february to September of 1977 to defraud persons seeking hospital and medical benefits by inducing them, in the name of "United Health and Retirement Association" (UHARA), to pay dues and contributions to an alleged plan under which members and their beneficiaries would receive benefits (with a life-time maximum of one million dollars) in event of sickness, accident, disability, retirement, death, or other interruption of earnings, without the intent and capability of performance and knowing that such representations regarding the plan were false; that no benefits were ever consumated and no monies were ever placed in trust or reserves for the payment of claims notwithstanding that in excess of $253,146 in membership fees and con-

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[1]At sentencing, the trial judge remarked: "It's true as the defendant says, his record heretofore is clear, however, the offense charged, the one the jury found guilt concerning, is a very serious matter, rip-off of the public . . ." Anticipating that there would be an appeal, the trial judge then said:

> I am going to impose a rather harsh sentence. It may sound bad to the defendant, and suggest that I will have an opportunity to review it if the Court affirms the conviction.
>
> The law is this: If the Court imposes, say, a low sentence and wishes to review it, the Court can never upgrade it, but you can always come down, and I'm not saying I will, I'm not saying it's a mistake. You also have a co-defendant in this case that hasn't been sentenced yet, and it's something I might look at, you know, with respect to equalizing the punishment.

tributions was received from members of UHARA, which monies were distributed to appellant and Bazarian or others at their direction; and that over 200,000 pieces of mail were sent through the Postal Service to various persons in several states for the purpose of inducing them to join UHARA. Each of the remaining counts charged substantially the same offense, but also specified a particular individual who was allegedly defrauded.

BACKGROUND

When viewed in the light most favorable to the government[2] the evidence shows the following:

The first meeting out of which grew the UHARA operation took place in early January of 1977 in Kansas City, Missouri, between appellant, who was from Austin, Texas, an insurance businessman named Jack Amason from Dallas, Texas, a Kansas City lawyer named Chris Mentrup, who was appellant's lawyer, and Bazarian, who had worked for appellant with a company called United Trust Co. and whom appellant had called to come up from Florida on his return trip to Oklahoma City, where he had an insurance agency, Central Management Systems (CMS). Amason had formerely worked for appellant in the insurance business. They discussed establishment of a self-funded health plan through an association under a recent act of Congress, Employee Retirement Income Security Act (ERISA), and signed an agreement drawn by Mentrup under which Bazarian would be paid a sixty percent commission to produce the business. On January 17 of 1977, a second meeting was held in Dallas, Texas, involving appellant, Amason, Mentrup, Gene Hawkins, an actuary, Jim Lane, a lawyer, and Bob King, an insurance executive. A brochure was designed by appellant and Amason, with the assistance of

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[2]*Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Wolf*, 561 F.2d 1376, 1378 (10th Cir. 1977).

the others, to market the plan under the name of "National Health Association," later changed to "United Health and Retirement Association." It advertised coverage by the plan of various hospital and medical doctor expenses, with a lifetime maximum benefit of one million dollars. The brochure was first printed in Austin by a printer selected by appellant, but after running out of copies, appellant sent the negatives to Oklahoma City where a lower bid had been received. Over 230,000 mailings were sent out through the Delong Mailing Service of Oklahoma City, with billing therefor to CMS. Each mailing included a "flyer" designed by Bazarian and a card to be returned to UHARA if the recipient was interested in receiving information about the UHARA plan, and a call by a salesman would result if interest was indicated. Shortly afterwards, Amason advised that he did not wish to be further involved. In February, appellant, Mentrup, and Bazarian met in Kansas City. Bazarian's mother-in-law, who worked for CMS, was appointed plan administrator, and two of his brothers-in-law were appointed plan trustees. Handling of monies was agreed upon (and subsequently carried out) as follows:

> Each $30 membership fee: divided equally among appellant, Bazarian, and Mentrup.
>
> Contributions to the plan: 15% retained in the UHARA bank account for salaries and expenses; 85% transferred to C.L. Johnson Agency Account,[3] from which 15% was sent to appellant about once a week (totaling $24,000 for the period Feb. 11 to June 3, 1977), "because it was his deal"; the remaining 70% transferred to the CMS account, with 50% going to salesmen for commissions and 20% for salaries, phones, rent, and mailing of brochures. The various bank accounts were in Oklahoma City.

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[3]The plan administrator was authorized by appellant to write checks on this account, and she appears to have been the only one who did so. Appellant was not authorized to write checks on the account.

A plan description, dated April 13, 1977, was filed by Bazarian's mother-in-law, as plan administrator, with the U.S. Department of Labor, which had administrative authority over ERISA. The filing indicated that the address of UHARA was the National Press Building, Washington, D.C., and that the date of the plan was March 15, 1977. The Washington, D.C. address was, in actuality, merely a mail drop with a phone answering service, and UHARA's operations were conducted out of the CMS offices in Oklahoma City to which mail received at the Washington, D.C. address was forwarded.

As of June 3, 1977, over 700 members were enrolled in the UHARA plan from several states; deposits of fees and contributions amounted to over $347,000, but only $1,638.75 remained in the UHARA account. No fund was established for payment of claims, although Hawkins, the actuary, had recommended that a reserve of 20% of the contributions be set aside under such a plan for claims in the first year; and claims received before appellant's indictment totaled in excess of $61,000,[4] but were not paid because there was no money to pay them.

Bazarian testified that, for all practical purposes, he and appellant were the "principals" in the scheme. Although appellant lived in Austin, Texas, he came to Oklahoma twice between January and June in regard to the UHARA operations, and he and Bazarian talked by telephone once a day or every other day about how the salesmen were doing and what areas they were working in. Bazarian was in charge of the salesmen and made the decisions on "day to day operations," but "basic problems" were discussed with appellant.

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[4]The plan administrator testified that UHARA started to receive claims after the first of June of 1977.

The plan administrator testified that appellant called her the first part of July of 1977 to find out why his check was late and that she told him—

> that there wouldn't be any money coming, as that money had been used to pay attorneys' fees and he became very upset and made some remarks about Charles Bazarian and then I became upset and I told him the reason we had to have the money for the attorneys' fees was because Chris Mentrup didn't do what he was supposed to do to begin with when he set up the association, that we had followed his instructions and that is why we had gotten into the predicament we were in.

The individuals specified in Counts II-V of the Indictment were: Marlin E. Smith of Lyons, Nebraska; Ms. Ruth F. Decker of Lahoma, Oklahoma; Mrs. Arthur H. Phipps, Jr., of Oklahoma City; and Roscoe R. Booth of Alma, Arkansas. Smith, Decker, and Phipps testified to taking out a membership in UHARA and enrolling in a UHARA plan after receiving a card in the mail, sending it to UHARA, and being visited by a salesman, and making out a check to UHARA for various periods of coverage (Smith—$678; Decker—$260; Phipps—$187.70). Booth testified that he answered an advertisement in the paper and, when called on by a salesman, took out a membership in UHARA and enrolled in a UHARA plan, with three months' coverage, paying $30 for membership and $50 for coverage.

In May of 1977, an investigation of UHARA was made by a compliance officer from the U.S. Department of Labor. He testified that it appeared that he had discovered a mail fraud case and that he received permission to discuss his findings with U.S. Postal Service inspectors. A postal inspector then conducted an investigation. Indictment of appellant and Bazarian eventually followed on September 6, 1978.

OPINION

Appellant argues that the verdict was not sustained by sufficient evidence and was against the clear weight of the evidence in that there was no showing that he devised or intended to devise any scheme or artifice to defraud as contemplated by 18 U.S.C. § 1341.[5] However, the evidence clearly shows that appellant was a prime mover and principal in the conception, organization, and activities of UHARA; further, that these activities were so conducted, through use of the Postal Service, as to obtain money by false or fraudulent pretenses, representations, or promises. Assuming that UHARA was originally conceived as a legitimate enterprise,[6] it was soon devised as a scheme to defraud in February of 1977 when, in the face of Hawkins' recommendation that a reserve of 20% of the contributions be set aside under such a plan to cover claims in the first year, an agreement to handle the monies was reached, as set forth above, with no reserve established for the payment of claims. Appellant, Bazarian, and Mentrup were parties to the agreement, which was carried out, with no claims ever being paid.

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[5]18 U.S.C. § 1341 provides as follows:

> Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatsoever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[6]Appellant argues that UHARA was "a sound and workable program when properly managed as conceived by Appellant."

In addition to the agreement by appellant, Bazarian, and Mentrup for the handling of monies, with no reserve established for the payment of claims, from which the specific intent to defraud of a person experienced in the insurance business could clearly be inferred, appellant, as a person of such experience, was so intimately connected with the UHARA operation that his failure to be concerned with more than his weekly checks under the agreement can only be characterized as "reckless indifference" tantamount to knowledge of the falsity of the representations and promises regarding UHARA. *United States* v. *Love*, 535 F.2d 1152, 1158 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976). Appellant not only received his $10 share of each $30 membership fee, but weekly payments of his 15% off the top of contributions to the UHARA plan, "because it was his deal." He kept in almost daily touch with Bazarian on the activities of the salesmen, and basic problems of the UHARA operation were discussed with him.

We are satisfied that the evidence discussed above was more than sufficient to sustain the verdict, that the verdict was not against the clear weight of the evidence, and that, contrary to appellant's argument, the district court did not err in denying appellant's motions for a directed verdict. *United States* v. *Seasholtz*, 435 F.2d 4 (10th Cir. 1970).

Appellant argues that the district court erred in admitting Government Exhibits 15 (cancelled check to UHARA for $678 from Marlin E. Smith), 17 (UHARA brochure given to Roscoe R. Booth by salesman), and 22 (UHARA brochure given to Mrs. Ruth F. Decker by salesman), because these were not produced pursuant to the court's order upon appellant's discovery motions until after trial was commenced. Appellant argues that the exhibits prejudiced the jury against him. However, we note that other copies of the UHARA brochure, not objected to, are in the record and that Marlin E. Smith testified that he had paid $678 for membership in the UHARA plan, so that the objected-to exhibits would merely be corroborative and cum-

ulative and could hardly be described as prejudicial. *United States* v. *Bowers*, 593 F.2d 376 (10th Cir.), *cert. denied*, 100 S. Ct. 106 (1979).

Appellant also argues that he was prejudiced by testimony relative to claims because, although the claims were not introduced into evidence, the Government failed to make them available for inspection until the second day of trial. However, the transcript indicates that on the Friday before trial, which commenced on Monday, appellant's lawyer was told that the claim files were available to check against a summary sheet which had been prepared by the postal inspector, copy of which had been given appellant's lawyer; also, that, at appellant's expense, copies of claims could be made. There is no allegation of bad faith on the part of the Government. Also, it appears from the transcript that appellant's counsel cross-examined the postal inspector quite thoroughly and effectively on the subject of claims, bringing out that the period covered by the indictment was February to September of 1977, whereas the postal inspector's calculation of $61,816.29 on fifty-nine claims covered a period extending to indictment on September 6, 1978. Wherein appellant was prejudiced on this point does not appear.

AFFIRMED.